

96CV02031-EHN-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JUDY CRUZ,

96 CV 2031

Plaintiff,

MEMORANDUM
AND
ORDER

- against -

UNITED STATES OF AMERICA,

Defendant.

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JAMIE C. ROSENBERG, Esq.
40 Exchange Place, 20th Floor
New York, New York 10005
for plaintiff

ZACHARY W. CARTER
United States Attorney, Eastern District of New York
(Vincent Lipari, of counsel)
One Pierrepont Plaza
14th Floor
Brooklyn, New York 11201
for respondent

NICKERSON, District Judge:

Plaintiff Judy Cruz brought this action under the Federal Torts Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq., seeking damages for injuries she says she received in an automobile accident.

The complaint alleges that on September 14, 1993, Edward Gearhart operated a United States Navy motor vehicle that hit a motor vehicle operated by James Pelliccio, which in turn hit the 1982 Toyota owned and operated by Ms. Cruz. She claims that Gearhart was negligent, that she sustained "serious injuri[es]" as

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defined in Section 5102(d) of the New York Insurance Law and economic loss greater than "basic economic loss" within the meaning of Section 5102(a), and that her damages exceed ten million dollars. The case was tried before the court solely on the issue of damages. The parties stipulated that the accident occurred on September 14, 1993.

At trial Ms. Cruz claimed that she suffered neck and back injuries, allegedly permanent, that she was pregnant and lost a fetus in a spontaneous abortion as a result of the accident, and that she also suffered emotional distress. She testified that a day or two after the accident she discharged from her vagina a bloody substance which she claimed contained fetal tissue. She said she saved this discharge in formaldehyde and took it to Staten Island Hospital in a vial.

I

As the parties agreed, the applicable law is that of New York State. See Richards v. United States, 369 U.S. 1, 82 S. Ct. 585 (1962); Hatahley v. United States, 351 U.S. 173, 76 S. Ct. 745 (1956).

Section 5104(a) of the New York State Insurance Law provides in pertinent part "in any action ... for personal injuries arising out of negligence in the use

or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss."

Section 5102(d) of that law, in pertinent part, defines "serious injury" to mean "a personal injury which results in . . . loss of a fetus; . . . permanent consequential limitation of use of a body organ, member, function or system; [and] significant limitation of use of a body function or system."

Section 5102(a), in pertinent part, defines "basic economic loss" to mean "up to fifty thousand dollars per person" for necessary expenses incurred as a result of the injuries for medical and other health related services.

There was no evidence that Ms. Cruz suffered "basic economic loss." The only question is whether she sustained a "serious injury."

Defendant contends that Ms. Cruz did not suffer such a "serious" injury, that she did not lose a fetus, and that she had no permanent consequential limitation of the use of a body organ or member, and no significant limitation of use of any body function or system.

II

Ms. Cruz offered no expert witness practicing obstetrics and gynecology. Instead her attorney sought to put questions as to gynecological matters to her doctor who had been concerned only with orthopedic medicine for almost eighteen years. The court declined to hear him as an expert in gynecological matters.

Rule 26 of the Federal Rules of Civil Procedure requires the parties to disclose to each other the identity of any expert witness to be used at trial and to accompany the disclosure with a written report prepared and signed by the witness and containing, among other things, a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, and any exhibits to be used as a summary of or support for the opinions.

On December 4, 1996, Magistrate Judge John L. Caden ruled that Ms. Cruz's damage expert reports would be due not later than February 1997, including any reports from a psychiatrist, an orthopedist, or a gynecologist. By the time of the next status conference before Magistrate Judge Caden on April 1, 1997, Ms. Cruz had not supplied such reports. Magistrate Judge Caden therefore ruled that the medical reports, "whether they be gynecological, orthopedic or

psychiatric, are due" no later than May 2, 1997. The order concluded "if they are not produced by that time, given the fact they are already past due, the experts will be precluded from testifying at trial."

On May 21, 1997, Ms. Cruz's attorney gave notice that Dr. Leo E. Batash would be called to testify as an expert witness as the treating physician, and annexed a report by Dr. Leo Batash, who styled himself as a practitioner in "physical therapy and rehabilitation." That report discusses Ms. Cruz's claims of orthopedic injury and the therapy that the doctor says he rendered to her.

The only references in the report as to a loss of a fetus are Dr. Batash's statement to his "initial impression" of, among other things, "post-traumatic miscarriage by history," and a statement, "post-traumatic miscarriage," included under the heading "final impression: based on physical examination and the latest finding."

Ms. Cruz's counsel argued at trial that this was a sufficient compliance with Rule 26(a)(2)(B). Obviously it was not. The report deals only with the doctor's physical examination, the treatment Ms. Cruz received for her alleged orthopedic injuries, the tests that were conducted, and the therapy given. The report gave defendant's attorney no information to enable him to

cross-examine Dr. Batash either as to his qualifications as a gynecologist or obstetrician or as to the basis for any gynecological opinions Dr. Batash might have.

Furthermore Dr. Batash testified that he had been a doctor in the former Soviet Union where he allegedly practiced obstetrics and gynecology until he came to the United States in 1979. He said he then entered into a training program in physical medicine and rehabilitation and completed that program in 1983. Since that date he said he practiced only physical medicine and rehabilitation. It is hard to see how he would be qualified to testify as to gynecology, a field in which he had not practiced for almost twenty years in this country or elsewhere.

III

Dr. Batash testified that he graduated from medical school in the former Soviet Union, State of Georgia, and that after coming to the United States entered a training program in physical medicine and rehabilitation at Mount Sinai School of Medicine. He has offices in Queens and Brooklyn and at some unspecified time was chief of the department of physical medicine and "rehab" at Kings Highway Hospital. His practice, commenced in 1980, has

concerned patients with back and neck problems and fractures.

Dr. Batash is not board certified, and although he conducted some EMGs he is not a member of the American Association of Electrodiagnostic Medicine, which requires an applicant to conduct 200 EMGs observed by a member and to observe a member conduct 200 EMGs. He testified he "had no time" even to learn those conditions for membership. He has no publications and does not teach although sometimes he lectures at the hospital.

Dr. Batash's testified to the matters stated in his report. He first saw Ms. Cruz ten days after the accident, that is on September 23, 1993. He said he saw her thereafter intermittently, for the last time the night before he testified on September 24, 1998.

Dr. Batash's opinion was that Ms. Cruz sustained injuries on September 14, 1993, causing structural neurological changes with chronic traumatic radiculopathy limiting the neck's range of motion by more than ten percent of normal and the lumbar spine's range by up to fifteen percent, and that these limitations were permanent and resulted in chronic localized pain.

Dr. Batash never gave Ms. Cruz prescriptions for medication, and said he could not recall why he had not

done so. He found that she never had any muscle atrophy or muscle weakness.

The doctor at first testified that he had seen Ms. Cruz once a month in 1994. But when faced with his office record he admitted he saw her only five times in that year. His records showed that he saw her three times in 1995, three times in 1996, five times in 1997, and four times in 1998. He claimed that just for preparing for trial and testifying he was being paid thirty-five hundred dollars.

Dr. Batash testified that when he first saw Ms. Cruz she had tenderness and complained of severe pain in the muscles of the neck and lower back and limitation of motion in those areas. He did not make a note of the extent of the limitation until May 19, 1997, almost four years after the accident. It was on that date that he determined she had a ten percent restriction in her neck and a fifteen percent restriction in her back.

In October 1993, he sent her for an MRI, which showed a normal lumbosacral spine. He performed an EMG test on Ms. Cruz on October 28, 1993. He claimed that the test showed she had cervical radiculopathy at C-6 of the neck and a similar condition at L-4 of the lower back.

Doctor Batash said that with therapy Ms. Cruz improved but that she continued to make complaints over the years. He concluded that her injuries were permanent. As noted, he never gave her any prescriptions for pain even though she testified it was "severe" when she first saw him. In addition he found no muscle weakness or atrophy or bulging disks of the back. He found nerve root irritation, which he admitted was something less than nerve root compression or nerve root impingement.

The court found the testimony of Dr. Batash to be unpersuasive, to put it charitably. In contrast the court found the testimony of defendant's expert, Dr. Robert Goldberg, to be rational and coherent. He is a specialist in physical medicine and rehabilitation with a sub-speciality in Electro Diagnostic Medicine, and serves on the staff of St. Vincent's Hospital Medical Center, and the New York Medical College, Valhalla, New York. A clinical associate professor at New York Medical College, he is responsible for training residents there and at St. Vincent's in the field of Physical Medicine and Rehabilitation. He is Board Certified and a member of the American Association of Electro Diagnostic Medicine.

Dr. Goldberg reviewed the medical records, including the records of Dr. Batash, performed a

physical examination of Ms. Cruz and prepared a report. He concluded that plaintiff had no evidence of disability on the basis of nerve or muscle pathology. He found from his physical examination on September 23, 1997, that her condition was normal physiologically.

The doctor's examination included evaluation of muscle strength, body development, ranges of motion, reflexes, presence or absence of atrophy, functional capacity for dressing, grooming, and gait. The range of motion for the shoulders, elbows, wrists, hands, hips, knees and ankles were complete and pain free. The cervical spine rotated fully to forty-five degrees bilaterally. The flexion of the neck was such that the chin came in contact with the chest wall. Extension, or backward bending, was without restrictions. All motion was pain free.

His examination of the lumbar spine showed that Ms. Cruz was able to bend forward to seventy-five degrees, bend sidewise thirty degrees on the left and right, and extend fifteen degrees. All these motions were made without complaints or pain.

He testified that the ability to bend forward to seventy-five degrees showed some loss of flexibility, but that this was normal, not pathologic. He attributed the loss to the fact that Ms. Cruz plainly was not physically active and to her age. She had no

spasm, no muscle atrophy, and no loss of strength. He found no indication that plaintiff was in pain. He determined this not only from what she said but also from the fact that she did not wince. Nor was there any "guarding." He found no indication of nerve damage or muscle damage. He asked Ms. Cruz whether she would permit an EMG or NCV study. She refused on the ground that she had been told not to answer any questions.

Dr. Goldberg disagreed with Dr. Batash's conclusion that there was a bilateral L-4 lumbar radiculopathy. His reasons for his conclusion were as follows. The EMG revealed normal activity at rest for a family of muscles of the lower extremities, specifically the vastus medialis, tibialis interior, and the peroneals. These muscles are innervated by nerves having as a component the L-4 nerve root. Lumbar radiculopathy would express itself in the abnormality in the muscles that the nerve supplies. There was no such abnormality.

Dr. Batash's EMG test, which showed at rest zero fibrillation and zero positive waves in the muscles, indicated that the physiological function of the L-4 nerve root had not been impaired. Nerve root "irritation" is not an indication of a significant injury but is something very limited, and the polyphasics shown on Dr. Batash's report of his EMG

show that from whatever bruise the muscle may have sustained, perhaps years ago, the muscle had recovered.

Dr. Goldberg also disagreed with Dr. Batash's conclusion that there was bilateral C-6 cervical radiculopathy. He explained if there were such a radiculopathy one would expect to see abnormalities in some of the muscles supplied by the sixth cervical nerve root. That means that the biceps, the triceps, the extensor carpi radialis, or the flexor carpi radialis would show abnormality. But the test showed they did not.

Moreover, the muscles were of normal strength. The fact that an EMG of the lumbar spine was normal was consistent with the fact that the muscles had normal strength and no atrophy. There was no indication of nerve compression, nerve impingement, or nerve degeneration in the report of the MRI.

Dr. Goldberg's testimony was credible and persuasive.

IV

On August 28, 1993, Ms. Cruz went to Staten Island Hospital. The hospital record showed that she reported that she had been for eight days expelling a dark brownish-black spotting with tissue. A pregnancy test made on that date showed her not pregnant. On the day

of the accident, September 14, 1993, St. Vincent's Hospital conducted another pregnancy test and found that she was not pregnant.

At the time of the accident plaintiff was thirty-nine years old and had not had any pregnancies in the prior nine years.

Defendant's expert in pathology, Dr. Scott A. Hirschman, the Chief of Clinical Pathology at New York Methodist Hospital, had extensive training in obstetrics, gynecology, and pathology. He testified to his examination under a microscope of the tissue that Ms. Cruz says was discharged from her vagina the night after the accident and preserved in formaldehyde.

Dr. Hirschman concluded that the substance discharged was decidual tissue, that is, a modified endometrium. He explained that the endometrium, the lining of the uterus, changes in response to different phases of the menstrual cycle by the action of progesterone, a hormone naturally produced either synthetically or by the human body. Progesterone transforms the endometrium into decidual tissue.

Decidual tissue is not a product of conception. A product of conception includes either identifiable parts of the placenta or part of the embryo or fetus, depending upon the time of the pregnancy. Dr. Hirschman looked for products of conception but he

found none. He also found the decidual tissue to be no longer viable. In order to be viable the decidual tissue must be maintained by a constant stimulation from progesterone. Once the stimulation is removed the tissue dies and inflammatory cells enter and will try to digest the tissue, which is no longer needed. If there is no longer a pregnancy the decidual tissue will die.

The doctor testified that there was no evidence that Ms. Cruz was pregnant on the date of the accident, September 14, 1993. Since there were no products of conception in the discharge and the decidual tissue was clearly devitalized with extensive necrotic changes, he estimated that it was at least a few weeks or more likely several months since the time Ms. Cruz could have been pregnant or been taking progesterone. The doctor concluded that the decidual tissue probably came as a result of a distant pregnancy.

The court found Dr. Hirschman's testimony credible and persuasive.

The defendant also called as an expert Dr. Leonard J. Corwin, an obstetrician and gynecologist. He also testified that Ms. Cruz was not pregnant on September 14, 1993. He testified that the Staten Island Hospital records for August 28, 1993 showing that Ms. Cruz had been spotting for eight days followed by the expelling

of tissue demonstrated that she was either having a menstrual period or had been pregnant and had miscarried before that date. August 28, 1993 was the date on which the Staten Island Hospital test showed she was not pregnant.

Dr. Corwin testified that the Staten Island Hospital records showed that a sonogram test performed on Ms. Cruz on September 17, 1993, showed an essentially normal uterus. The doctor testified that a previous trauma to the uterus that would cause vaginal bleeding would have been detected by the sonogram. In any event to cause such bleeding from the vagina there would have to have been a direct blow to the uterus, as with a gunshot wound or a stabbing, or a massive blow to the abdomen late in the pregnancy. Since there was no such evidence of any uterine injury the doctor concluded that the discharge of September 14, 1993, was not caused by the accident.

The court found Dr. Corwin's testimony credible and persuasive.

V

Ms. Cruz's testimony did not inspire confidence in her case. She testified that after the accident she was in a lot of pain. "Everything" hurt, including her back and neck. She said she was wearing her seat belt.

The "comments" of the ambulance personnel in their report noted that she was "ambulating" at the scene of the accident and had not been wearing a seat belt. She testified to continuing pain over the five years since the accident and to having "panic anxiety attacks" when driving. Yet she looked for work after the accident and actually worked for two months. She then quit and went back to study at the Fashion Institute where she had started in 1984.

She testified that her last child was born in 1984 and that she was 39 years old in 1993. In 1991 she met Louis Diaz with whom she was living. She then tried to get pregnant. She missed periods in June and July 1993, and on August 28, 1993, she told the doctors at Staten Island Hospital that for eight days she had been spotting a brownish fluid. It was then that the doctors administered the pregnancy test that showed she was not pregnant.

She said she told the doctors at St. Vincent's Hospital on September 14, 1993 that she was pregnant. But the pregnancy test administered on that date showed she was not pregnant.

Although Ms. Cruz testified on direct examination that her head hit the windshield, on cross examination she said her head hit the visor on the roof above the windshield.

She had not seen a doctor for ten days until she saw Dr. Batash. By then she had retained a law firm called Baines and Rettig, which Dr. Batash testified sent patients to him. Although he said that the firm may have sent Ms. Cruz to him, he claimed he could not recall whether that was so.

Ms. Cruz claimed on direct examination that she paid \$1400 dollars to have her 1982 Toyota repaired. On cross-examination she testified that although she kept receipts for what she paid a little at a time in check or cash, she never produced in court those records. She finally said that she could not remember what she paid but that it was "close" to \$1000.

The court finds Ms. Cruz's testimony unreliable and greatly exaggerated as to the injuries and pain she sustained.

VI

The New York Courts have often interpreted the meaning of the statutory terms "serious injury," "permanent consequential limitation of use of a body organ or member," and "significant limitation of use of a body function or system."

As the New York Court of Appeals said in Dufel v. Green, 84 N.Y.2d 795, 798, 622 N.Y.S.2d 900, 902 (1995), whether an injury is "permanent,"

"significant," or "consequential" "relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part." The court said that these matters are "within the medical expert's specialized knowledge." Id. Moreover, "mere subjective complaints of pain" in the abstract are insufficient" to show a serious injury. Dubois v. Simpson, 182 A.D.2d 993, 995, 582 N.Y.S.2d 561, 562 (3d Dep't 1992). There must be "objective" evidence of such an injury. Scheer v. Koubek, 70 N.Y.2d 678, 679, 518 N.Y.S.2d 788 (1987). See also Licari v. Elliott, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982) (painful sprain that limited movement of neck and back, bruised chest, and concussion not sufficient to show serious injury); Christopher v. Caldarulo, 160 Misc. 2d 360, 365, 608 N.Y.S.2d 998, 1001 (Sup. Ct. 1994) (minor limitation of movement is not statutorily significant).

VII

The court finds that Ms. Cruz did not prove her case, did not lose a fetus or sustain a "serious" orthopedic injury within the meaning of Section 5102(d) of the New York State Insurance Law, and does not have a "permanent consequential limitation of use of a body

organ or member" or a "significant limitation of use of a body function or system."

VIII

The foregoing consists of the court's findings of fact and conclusions of law.

The complaint is dismissed.

So ordered.

Dated: Brooklyn, New York
October 15, 1998

Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.